

# Center for Law and Military Operations (CLAMO) Report

*The Judge Advocate General's Legal Center & School*

## Legal Support for the Afghan National Army

### Background

Following the overthrow of the Taliban government in Afghanistan, the United Nations has struggled with how best to assist Afghanistan to establish a new government. This effort has yielded the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement).<sup>1</sup> The Bonn Agreement tasks member nations to guide and assist the fledgling Afghan government in a variety of areas.<sup>2</sup> For example, the Bonn Agreement tasks the Italian government to provide assistance with civil justice reform; it tasks the German government to assist in the creation of a new Afghan police force.<sup>3</sup> It also designates the United States as the lead government to assist the Afghan government to create and train an Afghan National Army (ANA).<sup>4</sup> To accomplish this objective, the United States has created the Office of Military Cooperation-Afghanistan (OMC-A), headquartered in the capital city of Kabul, near the U.S. embassy.<sup>5</sup> The OMC-A includes an Office of the Staff Judge Advocate (OSJA). Due to its unique mission, the OSJA routinely grapples with unusual and challenging issues.

The OMC-A's current Staff Judge Advocate is Colonel (COL) John Mantooth, who recently succeeded COL David Gordon.<sup>6</sup> Lieutenant Colonel (LTC) Platte Moring<sup>7</sup> of the

Pennsylvania National Guard and LTC Kyle Goerke<sup>8</sup> of the Oklahoma National Guard assist COL Mantooth. Although the OMC-A OSJA is small, it recently expanded when the Dutch Army supplemented it with LTC Hans Wiersma<sup>9</sup> and Captain (CPT) Eric Pouw.<sup>10</sup> The OMC-A joint manning document also authorizes a position for an Assistant Rule of Law Officer.<sup>11</sup> The author's recent rotation in this position serves as the basis of the instant report. While the author had many tasks and missions during the rotation, the principal missions were to (1) implement and oversee the Law of War (LOW) training program for the ANA; and (2) assist in the revision of the military justice code for the ANA.

### The LOW Training Program

To understand the ANA LOW training program, it is necessary to describe the training cycles at Kabul Military Training Compound (KMTC).<sup>12</sup> At KMTC, the U.S. Army conducts basic training for the ANA in ten-week cycles.<sup>13</sup> Each cycle consists of training one battalion, which is referred to as a "Kandak."<sup>14</sup> Every Kandak contains three constituent training companies. During its initial week—zero week—at KMTC, each Kandak undergoes basic in-processing, such as equipment and uniform issue. Over the following three weeks, every company rotates through various training regimens. One week is devoted entirely to classroom instruction. During this week, an

1. *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, S.C. Res. 1383, U.N. SC, 4434th mtg., U.N. Doc. S/2001/1154 (2001), available at <http://afghanlaw.de/Bonn%20Agreement.htm> (last visited Dec. 11, 2003) [hereinafter Bonn Agreement].

2. *Id.*

3. See G.A. Res. 875, U.N. GAOR, 56th Sess., U.N. Doc A/56/875 (2002).

4. *Id.* at 10; see also Hamid Karzai, Decree of the President of the Islamic Transitional State of Afghanistan on the ANA (Dec. 1, 2002), available at <http://www.unama-afg.org/docs/bonn/decreed%20on%20army.pdf> (last visited Dec. 11, 2003).

5. U.S. Dep't of Army, OMC-A Mission (unpublished) (on file with author). The OMC-A mission statement is as follows:

OMC-A, through training and mentoring, assists Afghanistan in developing a national multi-ethnic, values based, cohesive Ministry of Defense by establishing an organizational structure, functional procedures, and a professional trained staff to effectively provide strategic direction, policy, resources, and coordination of Afghan military institutions and operations.

*Id.*

6. Interview with COL John Mantooth, Staff Judge Advocate, in Kabul, Iraq (Nov. 15, 2003) (serving as the source for the information regarding personnel assigned to OMC-A) [hereinafter Interview with COL Mantooth].

7. Lieutenant Colonel Platte Moring is assigned as the Staff Judge Advocate for the 213th Area Support Group of the Pennsylvania National Guard. *Id.*

8. Lieutenant Colonel Kyle Goerke is assigned to the 45th Infantry Brigade of the Oklahoma National Guard. *Id.*

9. Lieutenant Hans Wiersma is assigned to Personnel and Organization Headquarters, Labor Law Division, Royal Netherlands Army, the Hague, the Netherlands. *Id.*

10. Captain Eric Pouw is assigned to Army Staff Headquarters, Legal Affairs Division, Royal Netherlands Army, The Hague, the Netherlands. *Id.*

Afghan major, who is a member of the cadre, instructs ANA trainees for five hours on basic LOW principles in Dari.<sup>15</sup>

Initially, the KMTC cadre was unaccustomed to the presence and LOW input of judge advocates. In anticipation of this reluctance, the OSJA demonstrated its ability to enhance the program and provide tangible support. Prior to its initial visit to KMTC, the OSJA drafted the *LOW Training Program for the ANA*.<sup>16</sup> Additionally, the OSJA procured several hundred copies of a cargo pocket-sized-summary of the Geneva Conventions,<sup>17</sup> translated into Dari. The OSJA's ability to supply the Afghans with useful training materials at this initial meeting proved that it could enhance training. Consequently, the KMTC eagerly accepted the OSJA review of the existing LOW Program of Instruction (POI), oversight of substantive classroom instruction, and suggestions for other training materials. Other training support initiatives included preparation of LOW posters, which now adorn the walls within KMTC, LOW slide shows in Dari and Pashtu, and LOW soldier cards.

One of the most critical initiatives was to continue LOW training at the unit-level after basic training. Near the end of the ten-week training cycle, the ANA Kandak battalions form with a regular (not training) cadre of officers and non-commissioned officers. Following graduation from basic training, ANA Kandak Battalions move to the ANA compound at Pol-E-Charkhi.<sup>18</sup> At Pol-E-Charkhi, the Kandak Battalions rotate through combat mission and training cycles.<sup>19</sup> Through the integration of situational training exercises, the OSJA hoped to incorporate LOW principals into unit standard procedures. Without the continuation of training at the unit level, ANA troops might simply forget the classroom instruction at KMTC. Through the assistance of a mentor, the OSJA met with Major General (MG) Mohammed Moin Faqueer, the ANA Central Corps Commander to discuss these concerns and ideas for improvement.<sup>20</sup> Major General Moin concurred with the OSJA.<sup>21</sup> Subsequently, they coordinated further planning details with the Deputy Corps Commander, Brigadier General (BG) Afzal Aman.<sup>22</sup>

11. U.S. Dep't of Army, OMC-A Joint Manning Document (unpublished) (on file with author). The Assistant Rule of Law Officer requires a U.S. or coalition attorney in the grade of major or lieutenant colonel for a minimum period of three months. In this position, a judge advocate assists the OMC-A Staff Judge Advocate and Rule of Law Officer in all aspects of military law reform and military legal training for the ANA and Ministry of Defense. Specific duties include the following:

- (1) Train commanders and soldiers at tactical level (focus on Central Corps) on law of land warfare, with emphasis on practical exercises and problem solving;
- (2) Train commanders on legal relationships with civil authorities;
- (3) Initiate "train-the-trainer" course to prepare ANA to assume responsibilities for above instruction;
- (4) Mentor Afghan Military Justice Departments as they reform the military judicial code and system to conform with international standards;
- (5) Establish instructional programs to support the growth of code and system, to include drafting training materials; and
- (6) Help conduct legal review of rules and regulations that the Afghan Ministry of Defense develops and instruct Afghan military legal personnel on this process.

*Id.*

12. The KMTC is a compound located about eight miles east of downtown Kabul.

13. Interview with CPT Matthew T. Jones, 1st Battalion, 86th Field Artillery Regiment, Vermont Army National Guard, at Kabul Military Training Compound (Nov. 3, 2003) [hereinafter Interview with CPT Jones]. Captain Jones served with the Training and Doctrine Department at KMTC. Though not a judge advocate, CPT Jones is a licensed attorney.

14. *Id.*

15. *Id.* The two principal languages within the ANA are Dari and Pashtu. *Id.*

16. CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW OF WAR TRAINING PROGRAM FOR THE AFGHAN NATIONAL ARMY (Oct. 23, 2003). This document is really an outline of instruction that is aimed at three different groups. The first section is the most detailed and is intended for those who will be conducting training classes to the troops. The second section is a basic guide for brigade and battalion-level ANA commanders. The third section lists basic soldier rules. Finally, the appendices contains the full text of the Geneva Conventions. *Id.*

17. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Due to an excellent relationship with the International Community of the Red Cross (ICRC), the OSJA obtained these translations. The author personally had several meetings with Michael O'Brien and Caspar Landolt of the ICRC. This was critical because it was very difficult to get accurate translations of documents produced in mass quantity.

18. Interview with CPT Jones, *supra* note 13.

19. Interview with Major (MAJ) David Butler, 87th Troop Command, in Pol-E-Charkhi, Afghanistan (Nov. 5, 2003) [hereinafter Interview with MAJ Butler]. Major Butler served as the American "mentor" for the 2d Brigade Commander for the ANA Central Corps.

20. Interview with MG Mohammed Moin Faqueer, ANA Central Corps Commander, in Pol-E-Charkhi, Afghanistan (Nov. 5, 2003) [hereinafter Interview with MG Faqueer]. The U.S. Army provides mentors to advise and assist all commanders in the ANA, from company to corps-level command. Interview with MAJ Butler, *supra* note 19.

The last phase of LOW training was more advanced for the senior Afghan leaders. The senior leaders ranged from brigade-level commanders to members of the Ministry of Defense. The OSJA's goal was to build on the foundational training of the International Community of the Red Cross (ICRC) who conducted LOW training with forty-two senior level Afghan officers.<sup>23</sup> Based on this goal, the OSJA drafted a higher-level LOW outline and began formulating a training plan around the outline. Completion and approval of the training plan are pending.<sup>24</sup>

### Military Justice Reform

Military justice reform is a far more difficult issue to resolve. The need for a workable system of justice within the ANA is immediate.<sup>25</sup> In one reported incident, an ANA noncommissioned officer (NCO) beat a fellow NCO on the head and shoulders with a metal pipe as retribution for stealing a soft drink.<sup>26</sup> Additionally, it was not uncommon to hear of an ANA commander locking a soldier inside a connex for a minor military infraction.<sup>27</sup> Yet, drafting legislation to revise a military justice system involves the input and coordination of many, in addition to the time required to negotiate the political process.

The first step in revising the military justice system was to develop a thorough understanding of it. Without a working knowledge of the current system, it would be difficult to suggest reforms. It was imperative to understand issues such as the

organization of the court system, applicable punitive articles, appellate procedure, and the relevant rules of evidence. Unfortunately, the Taliban destroyed much of the writings containing current and past Afghan laws, including the military justice code.<sup>28</sup> The few books remaining are closely held.<sup>29</sup>

In this context, the OSJA began meeting twice weekly with Major General Abdul Salaam Ismat, the Chief Judge for the Ministry of the Interior.<sup>30</sup> By September, the interest and attendance of the Afghan military judiciary increased. The following judges joined the semi-weekly meetings: Major General Abdul Hadi, Chief Judge for the Court for Officer Crimes; BG Sayed Hassan, Chief Judge for the Court of the Ministry of Defense; and BG Abdul Majid Naieb Khawary, Chief Judge for the Court of Appeals.<sup>31</sup>

Through discussions regarding the organizational structure of their military justice system, the Afghan judges eventually produced a draft statute, *The Organization and Authority of Courts of the Armed Forces of Afghanistan*.<sup>32</sup> Negotiations also included discussions aimed at modifications of the applicable punitive articles<sup>33</sup> and the inclusion of enumerated rights of an accused.<sup>34</sup> Their existing military justice code contains thirty-two punitive articles, all of which are "military service crimes."<sup>35</sup> It includes such offenses as treason,<sup>36</sup> surrendering,<sup>37</sup> and desertion.<sup>38</sup> Yet, it contains no provision for the prosecution of many common law offenses, such as murder or rape. Individual rights of an accused are found under other assorted Afghan laws<sup>39</sup> and international agreements to which Afghani-

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21. Interview with MG Faqeer, *supra* note 20.

22. Interview with BG Afzal Aman, Deputy Central Corps Commander, in Pol-E-Charkhi, Afghanistan (Nov. 5, 2003).

23. Interview with Michael O'Brien, ICRC, in Kabul, Afghanistan (Nov. 12, 2003).

24. Interview with COL Mantooth, *supra* note 6.

25. Interview with CPT Jones, *supra* note 13. While working on a daily basis with the ANA, CPT Jones personally witnesses and receives reports of the manner with which the ANA struggles to maintain discipline in its ranks. *Id.*

26. *Id.*

27. *Id.*

28. Interview with MG Abdul Salaam Ismat, Chief Judge of the Court for the Ministry of the Interior, in Kabul, Afghanistan (Sept. 21, 2003) [hereinafter Interview with MG Ismat].

29. *Id.*

30. The meetings began in July 2003, at the office of MG Ismet at the Ministry of the Interior. The U.S. representatives were COL David Gordon and LTC Platte Moring.

31. Interview with MG Ismat, *supra* note 28.

32. The Organization and Authority of Courts of the Armed Forces of Afghanistan (Nov. 11, 2003) (unpublished statute) (on file with author). This document sets forth the hierarchical structure of the court system and describes jurisdiction and appellate procedure. It also includes several substantive individual protections. For example, Article 8 states that "[a] person accused of a crime is presumed to be innocent until such time a court determines their guilt of an offense(s) by issuance of a final order." *Id.* This document is still in draft form—the Afghan legislature has not considered it. Interview with COL Mantooth, *supra* note 6.

33. OFFICIAL GAZETTE, MINISTRY OF JUSTICE, THE DEMOCRATIC REPUBLIC OF AFGHANISTAN (Apr. 5, 1986) [hereinafter OFFICIAL GAZETTE] (containing the existing applicable punitive articles).

stan is a signatory.<sup>40</sup> Interestingly, the *Official Gazette*, which contains the applicable punitive articles, contains no rules of evidence.<sup>41</sup>

At the suggestion of the author, the judges contemplated including the entire military justice code within one publication, similar to the *Manual for Courts-Martial*.<sup>42</sup> Aware of the need to proceed quickly, the OSJA drafted, edited, internally reviewed, and translated this publication—*Military Justice Code for the ANA*.<sup>43</sup> It incorporates *The Organization and Authority of Courts of the Armed Forces of Afghanistan*,<sup>44</sup> augments the punitive articles, supplies a procedure for the resolution of cases without trial (non-judicial punishment), and provides rudimentary rules of evidence.<sup>45</sup> The OSJA created a very basic draft to simplify its translation and implementation. Afghan officials are currently reviewing it.<sup>46</sup>

## Conclusion

Key projects for furthering stability with the ANA are (1) implementation of a vibrant and effective LOW Program and (2) revision of the military justice system. Although neither of these projects is the subject of headlines in the media, each represents a critical block in the foundation of the fledgling Afghan government. The foundation will continue to strengthen as judge advocates, working alongside the Afghan allies, make steady, measurable progress in fortifying the stability of that war-torn nation. Major R. Lance Miller.

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34. The accused has several sources of rights under the existing laws of Afghanistan. See AFGHAN CONST. OF 1964 (applying to Afghanistan under the Bonn Agreement until a new Afghan Constitution has been approved by the Constitutional Loya Jirga); Bonn Agreement, *supra*, note 1, para. 2 (1)); *Universal Declaration of Human Rights*, G.A. Res. 217A, 3d Sess., (1948); *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/10 (1998); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966); AFGHAN PENAL CODE OF 1355.

35. OFFICIAL GAZETTE, *supra* note 33, ch. 2.

36. *Id.* art. 17.

37. *Id.* art. 18.

38. *Id.* art. 19.

39. See, e.g., AFGHAN CONST. OF 1964; AFGHAN PENAL CODE OF 1355. For example, an accused is entitled to be free from the evidentiary use of a coerced confession under Article 26, of the AFGHAN CONST. OF 1964, but this protection is not explicit in the *Official Gazette*. AFGHAN CONST. OF 1964; OFFICIAL GAZETTE, *supra* note 33.

40. For example, the right to a speedy trial is secured by Article 9(3) of the *International Covenant on Civil and Political Rights*, *supra*, note 34, but is also not enumerated in the *Official Gazette*. OFFICIAL GAZETTE, *supra* note 33.

41. See *id.*

42. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002).

43. Military Justice Code for the ANA (Oct. 26, 2003) (unpublished) (on file with author) [hereinafter Military Justice Code].

44. The Organization and Authority of Courts of the Armed Forces of Afghanistan, *supra* note 32 (serving as a draft law which sets forth the organization of the courts, jurisdiction, and appellate procedure).

45. Military Justice Code, *supra* note 43.

46. Interview with COL Mantooth, *supra* note 6.